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I. INTRODUCTION

Since the early Seventies, Congress has continually made greater efforts to halt the flow of illicit drugs into the United States.[1] These efforts constitute what is popularly known as the Drug War.[2] This war is waged on all American borders, but most prominently off the coast of Florida.[3] Congress has attempted to fight this massive importation of drugs by vesting more authority to make arrests and confiscate controlled substances in, not only local law enforcement officers, but also the United States Customs Service, the United States Drug Enforcement Administration (DEA), and the United States Coast Guard.[4] In 1986, the United States attempts to deter importation climaxed with Congress introduction of numerous bills aimed at the growing threat that international drug trafficking posed to the general welfare of the nation.[5] Congressional efforts culminated in the passage of the comprehensive Anti-Drug Abuse Act.[6]

One of the most notable sections of the Anti-Drug Abuse Act is the Maritime Drug Law Enforcement Act.[7] The Maritime Drug Law Enforcement Act specifically relates to extraterritorial jurisdiction on the high seas and grants the Coast Guard authority to board foreign flagged

1. The current law in this area is the Maritime Drug Law Enforcement Act, 46 U.S.C. §§ 1901-1903 (1986).

2. Anderson, *Jurisdiction Over Stateless Vessels on the High Seas: An Appraisal Under Domestic and International Law*, 13 J. MAR. L. & COM. 323 (1982).

3. *Id.* at 323 n.1.

4. *Id.* at 323.

5. INTERNATIONAL DRUG TRAFFIC ENFORCEMENT ACT, H.R. REP. No. 794, 99th Cong., 2d Sess. (1986); INTERNATIONAL NARCOTICS CONTROL ACT OF 1986, H.R. REP. No. 845, 99th Cong., 2d Sess. (1986); Maritime Drug Law Enforcement Act, Pub. L. No. 99-570, § 3202, 100 Stat. 3207-95 (1986) (codified at 46 U.S.C. §§ 1901-1903 (1986)).

6. 21 U.S.C. § 801 (1986).

7. 46 U.S.C. §§ 1901-1903 (1986).

vessels on the high seas in enumerated circumstances.[8] Although this section became law without controversy, it represents a very broad grant of extraterritorial jurisdiction and a noteworthy departure from the traditional notion of the freedom of the sea.[9] This Note will consider the significant elements of the Maritime Drug Law Enforcement Act by first discussing both the prior law[10] and the current, amended law[11] extending the United States jurisdiction. The Note will then evaluate the validity of the new statute in light of principles of international and domestic law. In conclusion, the Note will suggest a proper interpretation of the statute in conformity with these principles.

II. THE MARIJUANA ON THE HIGH SEAS ACT

To fully appreciate the Maritime Drug Law Enforcement Act, one must consider the laws preceding it. The Coast Guard's boarding of vessels on the high seas was previously governed by the Marijuana on the High Seas Act (MHSA).[12] Congress designed the Act to facilitate increased enforcement by the Coast Guard of laws prohibiting the importation of controlled substances.[13] Controlled substances are defined as narcotic drugs which, for the purpose of controlling the distribution, classification, sale or use of drugs, have been designated as such under federal and state controlled substances acts.[14] The Act declared that it was unlawful for any person in the customs waters[15] of the United States, anyone who is a United States citizen on a vessel on the high seas, anyone aboard a vessel of the United States, or any person aboard a vessel subject to the jurisdiction of the United States, to intentionally or knowingly manufacture, distribute or possess with the intent to manufacture or distribute, illicit drugs.[16] A vessel of the United States under MHSA meant a vessel documented under United States law, unless it had been afforded nationality by a foreign nation.[17] A vessel subject to the jurisdiction of

8. *Id.*

9. *Compare id. with* S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No.10, at 25 (Sept.7).

10. Marijuana on the High Seas Act, 21 U.S.C. § 955(a) (1980).

11. Maritime Drug Law Enforcement Act, 46 U.S.C. §§ 1901-1903 (1986).

12. 21 U.S.C. § 955(a) (1980).

13. *Id.* Controlled substances are defined as narcotic drugs that, for the purpose of controlling the distribution, classification, sale, or use of drugs, have been designated as such under federal and state controlled substances acts. BLACK'S LAW DICTIONARY 298 (5th ed. 1979).

14. BLACK'S LAW DICTIONARY.

15. Section 955(b) defines customs waters as those defined in 19 U.S.C. § 1401(j) i.e., twelve miles distance from the coast or the distance otherwise agreed to.

16. 21 U.S.C. § 955(a).

17. *Id.*

the United States meant a stateless vessel.[18] The statute allowed for the legal importation of controlled substances for scientific, medical or other legitimate purposes when the carrier was acting in the lawful course of his duties.[19] The statute also declared that the federal courts were to have jurisdiction over cases under it and that violations of the Act were punishable.[20]

MHSA was passed in response to the inadequacies of earlier law and to the growing sophistication of international drug traffickers. The law preceding MHSA was the 1970 Comprehensive Drug Abuse and Control Act.[21] The 1970 Act was intended to revise the archaic and confusing laws governing the importation of controlled substances. The 1970 Act repealed all prior drug laws and consolidated federal law in the area.[22] In repealing the prior law criminalizing possession aboard United States vessels on the high seas, however, the drafters inadvertently failed to enact a similar new provision and left a glaring deficiency in the new law.[23] Ironically, the law legalized the possession of controlled substances aboard United States vessels anywhere beyond the customs waters.[24] As a result, federal prosecutors were only able to convict importers aboard United States vessels if they could show a conspiracy to import illegal drugs.[25]

At the same time the nature of drug trafficking became more sophisticated. Traffickers began to employ what is now commonly known as the mothership technique.[26] Large ships carrying narcotics hover beyond customs waters and unload portions of their cargo onto smaller, swifter delivery boats that can easily outrace the Coast Guard fleets.[27] This technique had few risks because even if the cargo was seized, it was relatively small and of little value compared with the value of the whole shipment.[28] Furthermore, even if traffickers were caught, the likelihood

18. *Id.* The Act defines a stateless vessel as a vessel without nationality or a vessel assimilated to a vessel without nationality, in accordance with Art. 6, para. 2 of the Convention on the High Seas. A ship flying under two or more flags is a ship without nationality.

19. *Id.*

20. *Id.*

21. 21 U.S.C. §§ 801-966 (1970).

22. Anderson, *supra* note 2, at 324.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 325; COAST GUARD DRUG LAW ENFORCEMENT, H.R. REP. No. 323, 96th Cong., 1st Sess. 3 (1979).

27. Anderson, *supra* note 2, at 325; COAST GUARD DRUG LAW ENFORCEMENT ACT, *supra* note 26, at 3.

28. *See* Anderson, *supra* note 2, at 324-25.

of conviction was slim because of the difficulties of proving a conspiracy.[29]

In addition to employing the mothership technique, foreign traffickers frequently used "stateless" vessels.[30] Since the 1970 Act did not cover stateless vessels, this practice also became a successful technique for evading jurisdiction.[31]

Congress drafted MHSA to correct the glaring deficiencies of the 1970 Act and to combat the innovative methods used by professional traffickers to evade jurisdiction. With the passage of MHSA, Congress achieved its aim of enhanced enforcement. However although Congress cautiously drafted MHSA, controversy surrounded its passage and numerous suits challenged its legality.[32]

The controversy centered around the provision extending the jurisdiction of the United States to include stateless vessels.[33] A number of courts discussed whether this provision violated international law by offending the long established doctrine of the freedom of the sea.[34] One significant factor in their consideration was the legislative history of MHSA indicating Congress intent to abide by international law when applying the drug enforcement laws extraterritorially.[35] Taking this into account, courts ultimately concluded that the law is within the boundaries of international law. The courts reasoned that MHSA complied with the general notion that stateless vessels have no claim to the rights and privileges granted by international law,[36] and that the extension of jurisdiction over stateless vessels on the high seas did not violate international law because international law protects only members of the international

29. *Id.*

30. *Id.* at 325.

31. *Id.*

32. United States v. Marino-Garcia, 679 F.2d 1373 (11th Cir. 1982); United States v. Newball, 524 F. Supp. 715 (E.D.N.Y. 1981); United States v. Robinson, 515 F. Supp. 1340 (S.D. Fla. 1981); United States v. Angola, 514 F. Supp. 933 (S.D. Fla. 1981).

33. *See* 21 U.S.C. § 955b(d) (1980) which defines "vessels subject to the jurisdiction of the United States" to include stateless vessels.

34. Anderson, *supra* note 2, at 325 n.11 and accompanying text. *See e.g.*, United States v. Cortes, 588 F.2d 106, 110 (5th Cir. 1979); *Angola*, 514 F. Supp. at 935; United States v. May May, 470 F. Supp. 384, 398 (S.D. Tex. 1979).

35. *Robinson*, 515 F. Supp. at 1343.

36. Anderson, *supra* note 2, at 334, citing *Coast Guard Drug Law Enforcement, 1979: Hearings on H.R. 2538 Before the Subcomm. on Coast Guard and Navigation of the Comm. on Merchant Marine and Fisheries*, 96th Cong., 1st Sess. 54-56 (1979)(statement of Morris D. Busby, Director, Office of Ocean Affairs, OES Bureau, Department of State). *Cortes*, 588 F. Supp. at 110.

community,[37] to which stateless vessels do not belong.[38]

In arriving at the conclusion that international law does not protect stateless vessels and that jurisdiction over such vessels should be upheld in MHSA proceedings, the courts relied on the Convention on the High Seas. Under the Convention, stateless vessels have no relationship to a sovereign[39] and are not entitled to invoke the freedom of the sea doctrine.[40] The stateless vessel is viewed as not accepting obligations ordinarily imposed when a ship registers with a foreign state, and therefore not entitled to the corresponding protection.[41] In addition, the courts relied on the strong international policy promoting the registration of vessels to ensure orderliness on the oceans and favoring any incentives to accomplish this.[42] Finally, the courts recognized that international practice permits the extension of jurisdiction to activities whose nature threatens the security of a state.[43] For these reasons courts approved the extension of jurisdiction found in MHSA.

III. THE MARITIME DRUG LAW ENFORCEMENT ACT

The current statute amending the Marijuana on the High Seas Act is the Maritime Drug Law Enforcement Act. The amended statute essentially mirrors MHSA. For instance, the amended statute makes it unlawful for any person on board a United States vessel, or a vessel subject to the jurisdiction of the United States, or any United States citizen, or any person within the customs waters of the United States, to knowingly or intentionally manufacture, distribute or possess with intent to distribute, a controlled substance.[44] The statute exempts contract carriers

37. *Cortes*, 588 F Supp. at 110; United States v. Green, 671 F.2d 46, 49, *cert. denied*, 457 U.S. 1135 (1982); United States v. Smith, 680 F.2d 255, 258 (1st Cir. 1982).

38. *Cortes*, 588 F.Supp. at 110; *Green*, 671 F.2d at 49; *Smith*, 680 F.2d at 258.

39. Convention on the High Seas, April 29, 1958, Art. 6, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T. 82 [hereinafter Convention on the High Seas].

40. Note, *International Law-Criminal Law-Federal Jurisdiction-21 U.S.C. § 955a Gives the Federal Government Criminal Jurisdiction Over All Stateless Vessels on the High Seas Engaged in the Distribution of Controlled Substances*, 52 U. CIN. L. REV. 292, 305 n.113 (1983) (noting that sovereigns are the primary beneficiaries of the freedom of the sea doctrine and only through them may individual citizens have access to it); Anderson, *supra* note 2, at 329-30 (noting that in general international law violations must be raised by nations on behalf of their citizens).

41. United States v. Angola, 514 F Supp. 933, 935 (S.D. Fla. 1981).

42. Note, *supra* note 40, at 309.

43. Rivard v. United States, 375 F.2d 882, 885 (5th Cir. 1967). This is the protective principle of jurisdiction. *See infra* text accompanying note 85 and notes 104-08.

44. 46 U.S.C. § 1901(a),(b),(c). This section falls under the chapter entitled Drug Abuse Prevention on Board Vessels.

and employees possessing or distributing a controlled substance in the lawful course of their duties,[45] and provides for federal jurisdiction and penalties[46] for violations of the statute.[47] It also states explicitly its intended extraterritorial effect.[48] Additionally, the statute clearly states the underlying premise upon which it presupposes its validity: "The Congress finds and declares that trafficking in controlled substances aboard vessels is a serious international problem and is universally condemned. Moreover, such trafficking presents a specific threat to the security and societal well-being of the United States."[49] The statute goes on to provide for interdiction procedures for the boarding of foreign vessels, admitting that it may be difficult when the vessel is on the high seas, but that consent must be obtained from the master of the vessel or from the country of registry.[50]

Although the Act almost identically sets forth what was contained in MHSA, in section 1903 there are two significant expansions of jurisdiction. First, section 1903(c)(1)(C) expands the definition of a vessel "subject to the jurisdiction of the United States" to include not only stateless, domestic, and foreign vessels within the customs waters of the United States, but also vessels of foreign registry on the high seas when the flag state consents or waives objection to enforcement jurisdiction.[51] Consent or waiver by a foreign nation may be obtained by a telephone call, radio conversation or similar oral or electronic means.[52] Notably, prior to section 1903(c)(1)(C), possession by foreign nationals on board foreign vessels on the high seas was not a violation of United States law. It was possible, however, for the United States to make a prior arrangement with a foreign nation to board vessels, or upon sighting a suspicious vessel on the high seas, to obtain the immediate consent of the foreign nation of the vessel to board.[53] In the past jurisdiction was also extended beyond the customs waters,[54] but this extension was limited to a specific distance off the coast and was not extended to the high seas generally.[55]

45. *Id.* at (e).
46. *Id.* at (f).
47. *Id.* at (g).
48. *Id.* at (h).
49. 46 U.S.C. § 1902.
50. *Id.* The Secretary of State is asked to assist in obtaining consent from the nation, or purported nation, of registry.
51. 46 U.S.C. § 1903(c)(1)(C) (1986).
52. 46 U.S.C. § 1903(c)(1)(E) (1986).
53. *See* 21 U.S.C. § 955(a) (1980).
54. Anti-Smuggling Act of 1935, 19 U.S.C. §§ 1701-1711 (1982) [hereinafter Anti-Smuggling Act].
55. *Id.*

Nevertheless, as will be shown this expanded meaning of a "vessel within the jurisdiction of the United States" falls within the established principles of American and international law.[56]

A second provision of section 1903 expands the traditional concept of jurisdiction significantly. The provision states: "A claim of failure to comply with international law in the enforcement of this Act may be invoked solely by a foreign nation, and a failure to comply with international law shall not divest a court of jurisdiction or otherwise constitute a defense to any proceeding under this Act."[57] This novel and ambiguous provision will be scrutinized carefully because its interpretation under certain circumstances will be crucial in a proceeding under this Act.

IV. ANALYSIS OF SECTION 1903(c)(1)(C)

In examining section 1903(c)(1)(C) one must first examine principles of American law to evaluate the expansion of the meaning of "vessels subject to the jurisdiction of the United States." Initially one must look to the United States Constitution for Congressional authority to prescribe such a law. The Constitution clearly grants Congress the power to "define and punish Piracies and Felonies committed on the high seas" and offenses against the Law of Nations.[58] Furthermore, American jurists have long recognized the right of the United States to prohibit conduct and extend jurisdiction over offenses committed on the high seas when they cause an effect in the United States.[59] The high seas, which lie beyond the internal waters[60] and the customs or territorial waters,[61] have fallen under United States jurisdiction in the past; foreign vessels, too, have been historically subject to United States jurisdiction.

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56. *See infra* notes 58-134 and accompanying text.

57. 46 U.S.C. § 1903(d) (1986).

58. U.S. CONST. art. I, § 8, cl. 10.

59. J. BRIERLY, THE LAW OF NATIONS 300-01 (1963); RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 (1965)[hereinafter RESTATEMENT]; United States v. The Pirates, 18 U.S. (5 Wheat.) 184 (1820). The Supreme Court referred to the Act of 1790 and noted "as to the right of the United States to punish all offenses committed on or from on board their own vessels, it cannot be doubted that the Act of 1790 extends to such offenses when committed on the high seas." *Pirates*, 18 U.S. (5 Wheat.) at 194.

60. United States v. Louisiana, 394 U.S. 11, 22 (1969); United States v. Postal, 589 F.2d 862, 869 (5th Cir. 1979), *cert. denied*, 444 U.S. 832 (1979). Internal waters ordinarily extend approximately three miles.

61. *Louisiana*, 394 U.S. at 22; *Postal*, 589 F.2d at 869 (citing Convention on the Territorial Sea and the Contiguous Zone, April 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205. The coastal state may exercise substantial control over this area but may not deny a nation the right of innocent passage).

A. Evolution of Jurisdiction in the United States

The United States first asserted jurisdiction over foreign vessels on the high seas in 1790 when Congress passed An Act to Provide More Effectually for the Collection of Duties. The purpose of this Act was to enhance revenue collection.[62] The 1790 Act was specifically aimed at preventing the unloading of cargo beyond the customs waters without payment of duties. Justice Marshall wrote of the Act:

> The authority of a nation, within our own nation is absolute and exclusive . . . but its power to assure itself from injury may certainly be exercised beyond the limits of its territory. Upon this principle, the right of a belligerent to search a neutral vessel on the high seas, for contraband, is universally admitted . . . so too, a nation has a right to prohibit commerce with its colonies.[63]

Justice Story stated that the Act applies equally to all vessels, and indeed more strongly to foreign vessels, since frauds committed by them in evasion of the revenue laws are less easily detected.[64]

In 1935 Congress again asserted jurisdiction over foreign flagged vessels on the high seas by passing the Anti-Smuggling Act. This Act, intended to quell the importation of liquor to the United States,[65] authorized customs officers to board any vessel within a sixty-two mile limit and to enforce the statute.[66] It, like the current provisions found in section 1903(c)(1)(C), extended jurisdiction beyond the customs waters to vessels hovering off the coast with illicit cargos.[67]

The United States adoption of legislation extending jurisdiction, evidenced by these and similar acts, reaches far back into American history. This type of legislation has been limited in scope, and traditionally confined to measures that are reasonably necessary and neither harassing nor vexatious.[68]

In addition the practice of granting the Coast Guard legal authority to board foreign vessels on the seas can be traced back almost two hundred years to when Congress created the Coast Guard in 1790, as the "Revenue Cutter Service,"[69] and granted it the authority to board,

62. *Postal*, 589 F.2d at 879 (citing An Act to Provide More Effectually for the Collection of Duties, ch.35, 1 Stat. 145 (1790) [hereinafter 1790 Act]).

63. *Id.* (citing Church v. Hubbart, 6 U.S. (2 Cranch) 187 (1804)).

64. *Id.* (citing The Betsy, 3 F. Cas. 303, 304 (C.C.D. Mass. 1818) (No. 1365)).

65. Anti-Smuggling Act, *supra* note 54; *Postal*, 589 F.2d at 880.

66. *Id.*

67. *Id.*

68. Church v. Hubbart, 6 U.S. (2 Cranch) 187 (1804); *Postal*, 589 F.2d at 879.

69. *Postal*, 589 F.2d at 879 n.26 (citing ch.35 § 62, 1 Stat. 175 (1790)).

search, and examine all vessels in the customs waters.[70] Today, existing legislation allows the Coast Guard to make inquiries, inspections, searches, seizures, and arrests upon the high seas and the customs waters under certain circumstances when the United States has jurisdiction.[71] The statute is not, on its face, limited to domestic vessels or domestic waters.[72] Section 1903(c)(1)(C)'s grant of authority, supported by existing statutes,[73] simply aids the Coast Guard in carrying out the functions of maritime law enforcement, for which it was created.[74]

Thus, American principles of extraterritorial jurisdiction found in the Constitution, prior legislation, and practice appear to permit the extension of jurisdiction over foreign vessels on the high seas to meet threats posed by cargo vessels lurking beyond the customs waters. Like the 1790 Act and the Anti-Smuggling Act, which were upheld in United States courts as valid extensions of jurisdiction, the Maritime Drug Law Enforcement Act may be upheld as a reasonable and necessary measure intended to prevent foreign vessels hovering off the United States coasts from unloading illegal cargo and evading jurisdiction.

B. Jurisdiction under International Law

In evaluating the Maritime Drug Law Enforcement Act, principles of international law should be consulted since, to the extent that they do not conflict with United States law, they become part of United States law.[75] One of the most important distinctions required by international law when a local law is exercised extraterritorially is the distinction between legislative jurisdiction and enforcement jurisdiction.[76] Legislative jurisdiction is jurisdiction to prescribe a law, while enforcement jurisdiction is jurisdiction to enforce a law.[77] Under international law there is no jurisdiction to enforce unless there is jurisdiction to prescribe. The converse, however, is not always true, since even when there is jurisdiction to

70. *Id.* at § 64.

71. 14 U.S.C. § 89(a) (1982)(enacted Aug. 4, 1949); United States v. Cadena, 585 F.2d 1252, 1259 (5th Cir. 1978), *overruled on other grounds*, United States v. Williams, 617 F.2d 1063, 1078 n.18 (5th Cir. 1980) (en banc). Section 89(a) was necessary because 18 U.S.C. § 7 (1982)(enacted June 25, 1948) granted the special maritime and territorial jurisdiction of the United States to the high seas, but not to foreign vessels.

72. *Cadena*, 585 F.2d at 1257 (discussing 14 U.S.C. § 89(a)).

73. 14 U.S.C. § 89(a).

74. COAST GUARD DRUG INTERDICTION AND LAW ENFORCEMENT ACT OF 1986, H.R. REP. NO. 973, 99th Cong., 2d Sess. 1 (1986).

75. The Paquete Habana, 175 U.S. 677, 700 (1900).

76. United States v. Smith, 680 F.2d 255, 257 (1st Cir. 1982).

77. *Id.*

prescribe there is not automatically jurisdiction to enforce.[78]

The classic *Lotus* case[79] illustrates this important distinction between legislative and enforcement jurisdiction well. In the *Lotus* case a Turkish vessel and a French vessel collided on the high seas and eight Turkish sailors drowned. When the master of the French vessel voluntarily set foot on Turkish shores, the Turkish state immediately arrested him and instituted criminal proceedings against him. He was eventually convicted of manslaughter on the high seas.[80] The international tribunal held that Turkey was free to prescribe a law criminalizing such activities on the high seas. Turkey, then, had legislative jurisdiction.[81] The Court did not hold, however, that Turkey could enforce that law by making an arrest on the high seas. Indeed, Turkey had no enforcement jurisdiction and it was only owing to the French sea captain's entry into Turkey that the Turkish government had jurisdiction to make the arrest.[82]

Similarly, in analyzing section 1903(c)(1)(C) it is necessary to determine not only whether there is jurisdiction to prescribe the law criminalizing possession, but also whether there is jurisdiction to enforce the law by making arrests on the high seas. In the *Lotus* case the freedom of the sea doctrine prevented enforcement jurisdiction.[83] Whether the freedom of the sea doctrine will bar enforcement of the Maritime Drug Law Enforcement Act must be considered next.

i. Jurisdiction to Prescribe

International law recognizes five basic principles which may be used by a sovereign to justify the criminalizing of an act that takes place outside the sovereign's own state. Originally announced in *Rivard v. United States,*[84] these principles are: (1) the passive personality principle, (2) the nationality principle, (3) the universality principle, (4) the territoriality principle, and (5) the protective principle.[85] These principles permit states to apply their laws extraterritorially to individuals who

78. *Id.*

79. S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No.10 (Sept.7).

80. *Id.*

81. *Id.* Note that Article 11 of the Convention on the High Seas overrules *Lotus* on this point of the penal responsibility of the master of the vessel. Convention on the High Seas, *supra* note 39, at Art.11.

82. *Lotus,* 1927 P.C.I.J. (ser. A) No.10. There was no enforcement jurisdiction over the French sea captain on the high seas. Under the freedom of the sea doctrine, France as the flag state had exclusive jurisdiction over the vessel while it was on the high seas. By entering the Turkish territory, however, the French captain submitted to Turkey's laws. *Id.* at 70.

83. *Id.*

84. 375 F.2d 882 (5th Cir. 1967).

85. *Id.* at 885.

would otherwise be outside their jurisdiction.[86]

The passive personality principle provides a basis for jurisdiction when the victim of the crime is of the state's own nationality.[87] This principle is premised on the view that extraterritorial criminal acts of a foreign national affect a state's own citizens, and thus, a state has a vested interest in punishing the perpetrator of the crime.[88] Currently, however, the United States does not recognize this as a valid basis of jurisdiction.[89] No domestic court, consequently, has turned to this principle as a basis for extending United States jurisdiction to the high seas.[90]

The nationality principle provides a basis for jurisdiction when the criminal offender is a citizen of the state.[91] While a state cannot arrest one of its own citizens in the territory of another state, it is a long established practice that a state may arrest one of its own citizens on the high seas or in localities not within the jurisdiction of all nations.[92] Since section 1903(c)(1)(C) deals with foreign nationals on the high seas, the nationality principle is not relevant to an examination of the new statute's validity under international law.

The universality principle provides a basis for jurisdiction when the offender is within the custody of the state[93] i.e., when the offender is in the state's port. The underlying rationale of this principle is that the port state is in a better position to enforce the criminal laws and should be given the authority under international law to do so.[94] The universality principle has come to mean that there are universally condemned crimes that are punishable if the state has custody of the offender.[95]

Crimes which are usually punishable under this principle and over which extraterritorial jurisdiction legitimately extends are extremely heinous ones, crimes against humanity or war crimes. In 1936, an attempt to bring drug trafficking within the realm of universally condemned crimes failed.[96] Consequently, legislators and domestic courts have not

86. *Id.* This is because such individuals are outside of the state's borders, foreign nationals or aliens merely present within the state.

87. *Rivard*, 375 F.2d at 885 n.9; Clark, *Criminal Jurisdiction over Merchant Vessels Engaged in International Trade*, 11 J. MAR. L. & COM. 219, 221 (1980); Note, *supra* note 40, at 298 n.53.

88. Clark, *supra* note 87, at 221; RESTATEMENT, *supra* note 59, at § 30(2).

89. Note, *supra* note 40, at 298 n.53; RESTATEMENT, *supra* note 59, at § 30(2).

90. *See* Note, *supra* note 40, at 298 n.53.

91. *Id.* at 298 n.49; Clark, *supra* note 87, at 220.

92. Clark, *supra* note 87, at 221.

93. *Id.* at 220-21; Rivard v. United States, 375 F.2d 882, 885 (5th Cir. 1967).

94. *See* Clark, *supra* note 87, at 220, 222.

95. *Id.* at 222.

96. Note, *supra* note 40, at 298 n.52.

invoked the universality principle to justify extending the jurisdiction on the high seas to trafficking situations.[97]

The territoriality principle provides a basis for jurisdiction when criminal acts occur within the state, or when criminal acts occurring outside the state produce effects within the state.[98] This principle corresponds to the traditional common law view that "all criminal jurisdiction is inherently territorial."[99] Thus, a foreign national may be prosecuted in the territory either where he commits the crime or where his crime causes an effect.[100] This theory looks to objective effects within the sovereign state and justifies the enactment of laws condemning criminal activities.[101] Domestic courts in the United States have frequently invoked this principle to uphold the validity of drug trafficking laws affecting foreign nationals on the high seas,[102] since massive narcotics importations unquestionably produce significant effects within the United States.[103]

The protective principle justifies the enactment of laws over foreign nationals perpetrating extraterritorial criminal acts that either threaten a nation's security or interfere with a government's proper functioning.[104] For example, immigration, currency, and mail fraud offenses committed abroad threaten a nation's security or interfere with its functioning.[105] The rationale behind the protective principle is that these offenses affront the sovereignty of the enacting nation.[106] The enacting nations therefore have the right to protect themselves[107] and frequently do invoke this principle to assume jurisdiction.[108] Legislatures often use the protective principle to justify enacting laws that extend jurisdiction in drug traffick-

97. *See Id.*

98. Rivard v. United States, 375 F.2d 882, 885 (5th Cir. 1967); Clark, *supra* note 87, at 220-21; Note, *supra* note 40, at 298 n.51.

99. Clark, *supra* note 87, at 221.

100. *Id.*; United States v. May May, 470 F. Supp. 384, 395 (S.D. Tex. 1979).

101. United States v. Columba-Colella, 604 F.2d 356, 358 (5th Cir. 1979); United States v. Postal, 589 F.2d 862, 885 (5th Cir. 1979), *cert. denied*, 444 U.S. 832 (1979); United States v. Cadena, 585 F.2d 1252, 1257 (5th Cir. 1978), *overruled on other grounds*, United States v. William, 617 F.2d 1063, 1078 n.1 (5th Cir. 1980) (en banc).

102. *Postal*, 589 F.2d at 885; *Cadena*, 585 F.2d at 1257.

103. *Postal*, 589 F.2d at 885; *Cadena*, 585 F.2d at 1257.

104. Clark, *supra* note 87, at 221-22; Note, *supra* note 40, at 298 n.50.

105. Clark, *supra* note 87, at 222.

106. Clark, *supra* note 87, at 221-22; United States v. Pizzarusso, 388 F.2d 8, 10 (2d Cir. 1968), *cert. denied*, 392 U.S. 936 (1968); United States v. Columba-Colela, 604 F.2d 356, 358 (5th Cir. 1979); Church v. Hubbart, 6 U.S. (2 Cranch) 187, 234-35 (1804).

107. *See* Clark, *supra* note 87, at 222; *Pizzarusso*, 388 F.2d at 10; *Hubbart*, 6 U.S. (2 Cranch) at 234-35.

108. Clark, *supra* note 87, at 221-22; *Pizzarusso*, 388 F.2d at 10; *Columba-Colela*, 604 F.2d at 358; *Hubbart*, 6 U.S. (2 Cranch) at 234-35.

ing cases.[109]

The Maritime Drug Law Enforcement Act is supported by both the protective and territorial principles. The Act refers to international drug trafficking as a "specific threat to the security and societal well-being of the United States,"[110] reflecting the view of Dante Fascell, Chairman of the Foreign Affairs Committee, that drug importation is "not only a tragic national menace but a threat to our domestic peace and security."[111] This provision of the Act indicates that the protective principle would support its enactment. The statute also implies that the importation of drugs both poses a serious international problem and creates significant effects in the United States.[112] Therefore the territorial principle would further support its enactment.[113]

In summary then the millions of pounds of narcotics, worth billions of dollars, which enter the United States annually[114] gave the United States under either the protective or territorial theory, the jurisdiction to prescribe a law criminalizing narcotics manufacture, distribution, and possession with intent to manufacture or distribute, regardless of whether or not the offenders are foreign nationals. A court may find legislative jurisdiction to enact the Maritime Drug Law Enforcement Act is consistent with the analogous and seminal *Lotus* case. The court in *Lotus* permitted the extension of legislative jurisdiction over foreign nationals on the high seas on the principle that a sovereign is entitled to protect its own citizens from criminal activity.[115]

ii. Jurisdiction to Enforce

The more controversial question raised by section 1903(c)(1)(C) is whether the United States is entitled under the principles of international law to stray from *Lotus* and to authorize enforcement of the statute, specifically, whether the Coast Guard may properly be authorized to board foreign flagged vessels on the high seas in order to make arrests and seizures and to otherwise enforce the provisions of the law. The international principle embodied in the Convention on the High Seas in Article

109. Clark, *supra* note 87, at 221-22; *Pizzarusso*, 388 F.2d at 10; *Columba-Colela*, 604 F.2d at 358; *Hubbart*, 6 U.S. (2 Cranch) at 234-35.

110. 46 U.S.C. § 1902 (1986).

111. H.R. REP. No. 798, 99th Cong., 2d Sess., pt.1, at 1 (1986).

112. 46 U.S.C. § 1902; Note, *High Seas Narcotics Smuggling and Section 955a of Title 21: Overextension of the Protective Principle of International Jurisdiction*, 50 FORDHAM L. REV. 688, 688 n.1 (1982).

113. *See* Note, *supra* note 112, at 688 n.1.

114. *Id.*

115. *The Lotus Case*, 4 P.C.I.J. ANN. R. (ser. E) No.4, at 171-73 (1927-1928).

6 provides: "Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties[116] or in these articles, shall be subject to its exclusive jurisdiction on the high seas."[117] Thus under Article 6, no state has jurisdiction over a foreign vessel on the high seas unless the articles or an international agreement so provides.[118]

Section 1903(c)(1)(C) is by definition self-confining and within its limits does not offend Article 6's general notion of exclusive jurisdiction by the flag state.[119] Section 1903(c)(1)(C) limits enforcement jurisdiction to those situations in which the flag state has entered into an international agreement with the United States, either by pre-arrangement or by oral communications, at the time the Coast Guard attempts to board the vessel.[120] Under Article 6 international agreements need not be formal[121] and have frequently been upheld despite a lack of formality.[122] In fact, the Coast Guard carried out section 1903(c)(1)(C) boardings long before the statute's enactment in 1986.[123] It is the regular practice of the Coast Guard, when sighting a suspicious foreign vessel within the customs waters, to seek permission first from the captain, and then from the state if necessary, to board the vessel.[124] This practice does not violate Article 6's general denial of jurisdiction to nonflag nations to board, except in limited circumstances,[125] since Article 6 defines one of those circumstances to be an international agreement. The international agreement provision in Article 6 encompasses section 1903(c)(1)(C)'s "consent or waiver of objection to enforcement jurisdiction by the United States."

116. Statement of Stephan A. Riesenfeld, Professor of Law, Hastings College of the Law (Aug. 28, 1987). When discussing Article 6 of the Convention on the High Seas, Professor Riesenfeld said that "treaties" within the meaning of the Convention can be very informal. As long as they are agreements, *e.g.*, phone calls or oral communications between those with authority, they will be upheld.

117. Convention on the High Seas, *supra* note 39, at para. 1.

118. *Id.*

119. 46 U.S.C. § 1903(c)(1)(C) (1986) enumerates the specific circumstances under which jurisdiction over foreign vessels on the high seas exists.

120. Although this is not explicit in the statute, these are inevitably the two alternatives.

121. *See* Riesenfeld, *supra* note 116.

122. *Id.*

123. *See* 14 U.S.C. § 89(a) (1982)(amended Aug. 3, 1950), empowering the Coast Guard to board foreign vessels after making inquiries.

124. United States v. Green, 671 F.2d 46, 49 (1st Cir. 1982), *cert. denied*, 457 U.S. 1135 (1982); United States v. Streifel, 665 F.2d 414, 417 (2nd Cir. 1981); United States v. May May, 470 F. Supp. 384, 388 (S.D. Tex. 1979).

125. Article 6 of the Convention on the High Seas lists these limited circumstances as either exceptional circumstances specified in international treaties or circumstances provided for in the Convention articles. Convention on the High Seas, *supra* note 39, at Art. 6.

United States v. Green[126] illustrates how the Coast Guard boardings of foreign vessels on the high seas, when the flag nation consents, are consistent with Article 6 boardings under an international agreement. In *Green* the Coast Guard encountered a suspicious British vessel fifty-five miles off the coast of New England. The vessel was moving sluggishly and appeared to be carrying a heavy load.[127] The captain of the British vessel, in response to the Coast Guard's request, refused to consent to boarding by Coast Guard officers.[128] The State Department, pursuant to its statutory responsibility,[129] sought permission from the British government to board the vessel.[130] British authorities granted permission. When the Coast Guard boarded the vessel, they discovered and seized a large quantity of marijuana.[131]

The court in *Green* held that the consent of the British government vitiated any violation of the exclusive sovereignty provision of the Convention on the High Seas (Article 6).[132] The British government, the court said, waived the rights of the individuals to raise the issue of the boarding as a treaty violation.[133] The court held that there was no violation because the policy underlying Article 6 is merely intended to prevent arbitrary interference by one state with the vessels of another. By permitting the boarding by law enforcement officers when the flag state consents, the United States actually promotes the policy underlying Article 6,[134] by recognizing the flag nation's ability to exercise authority over its vessels.[135] In spite of appearing on its face to be an overbroad grant of jurisdiction, section 1903(c)(1)(C) falls within the established principles of domestic and international law since it allows only a limited extension of jurisdiction to foreign vessels on the high seas.

126. 671 F.2d 46 (1st Cir.), *cert. denied*, 457 U.S. 1135 (1982).

127. *Id.* at 48.

128. *Id.* at 49.

129. Act of Oct. 27, 1986, Pub. L. No. 99-570, title II, § 2015, 100 Stat. 3207-68. This session law governs interdiction procedures for vessels of foreign registry and directs the Secretary of State to act as an intermediary between the Coast Guard and the State where the vessel purports to be registered.

130. *Green*, 671 F.2d at 49. Permission was sought through the American Embassy in London.

131. *Id.*

132. *Id.* at 49-50.

133. *Id.* at 50.

134. Ruf, *Coast Guard Searches of Foreign Flag Vessels*, 14 LAW. OF THE AM. 355, 357 (1982).

135. *Id.* at 357.

V. ANALYSIS OF SECTION 1903(d)

Section 1903(d) does not enjoy the same validity as section 1903(c)(1)(C). This section states that only a foreign nation, and not an individual, may claim that international law has been violated.[136] Furthermore, a finding of failure to comply with international law shall not divest the court of jurisdiction or otherwise constitute a defense.[137] It is difficult not to conclude that this section is self-contradictory. On the other hand, it does reflect several doctrines of international law recognized by domestic courts.

Section 1903(d)'s first clause states that foreign states and not individuals must raise international law violations.[138] This echoes the familiar concept in international law that the rights and immunities granted by international law are given to nations, and only reach citizens through their nations.[139] Thus, in most cases,[140] individuals are barred from raising international law violations as a defense to their prosecution.[141] The rationale for this exclusion is that the wrong committed violates international but not domestic law and consequently[142] only nations, not individuals, are competent to raise violations of international law.[143] The clause's requirement that the sovereign raise such violations is thus in conformity with international law.

The second clause of 1903(d), however, does not conform to international law. It states that international law violations will not deprive the court of jurisdiction or constitute a defense in a Maritime Drug Law Enforcement Act prosecution.[144] This clause echoes the Ker-Frisbie Doctrine recognized by American courts which prevents a defendant from arguing that his presence was secured in violation of either international or domestic law.[145] Nevertheless, even under the Ker-Frisbie Doctrine, there are some situations, (likely to arise in a Maritime Drug Law Enforcement Proceeding) in which foreign nationals are individually per-

136. 46 U.S.C. § 1903(d) (1986).
137. *Id.*
138. *Id.*
139. Anderson, *supra* note 2, at 329.
140. *Id.* Diplomatic immunities or human rights cases are the exception to the general rule that international law violations may not be raised. P. JESSUP, A MODERN LAW OF NATIONS, at 17-18 (1948).
141. *Id.*
142. *Id.*
143. *Id.*
144. 46 U.S.C. § 1903(d).
145. Ker v. Illinois, 119 U.S. 436, 443-44 (1886); Frisbie v. Collins, 342 U.S. 519, 522 (1952); United States v. Cadena, 585 F.2d 1252, 1259 (5th Cir. 1978), *overruled on other grounds*, United States v. Williams, 617 F.2d 1063, 1078 n.18 (5th Cir. 1980) (en banc).

mitted to raise international law violations.[146]

The Ker-Frisbie Doctrine evolved from the decision in *Ker v. Illinois*.[147] In *Ker* a defendant accused of larceny fled to Peru. Although the necessary papers concerning his extradition existed, he was forcibly and violently returned to the United States.[148] The defendant claimed that the court lacked jurisdiction over him because his extradition had violated the terms of a treaty between the United States and Peru,[149] and that his seizure and forcible transportation from Peru amounted to kidnapping.[150] The court held that although Ker might have some redress and could seek some remedy for his unauthorized seizure elsewhere, forcible abduction was not a sufficient reason to deprive the court of jurisdiction and presented no valid objection to his trial.[151] The court thus held that Ker had no right under the treaty to claim a violation.[152]

Similarly, in *Frisbie v. Collins*[153] a defendant accused of a Michigan murder was forcibly brought from Illinois to Michigan. He appealed his conviction on the grounds that it was invalid because he had been forcibly abducted.[154] His efforts, however, were also unsuccessful and the court held: "There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will."[155]

In the realm of international law, domestic courts have widely accepted the Ker-Frisbie Doctrine.[156] At the same time, however, courts have been at liberty to enforce Article 22 of the Convention on the High Seas, which gives parties a right to compensation for damages suffered as a consequence of international law violations which occur when foreign flagged vessels on the high seas are unjustly boarded.[157] Courts have adhered to the view that violations should be compensated, but such vio-

146. *See supra* notes 140-42 and accompanying text.
147. *Ker*, 119 U.S. at 437-38.
148. *Id.* at 438.
149. *Id.* at 439.
150. *Id.* at 438.
151. *Id.* at 444.
152. *Id.* at 443.
153. 342 U.S. 519, 520 (1952).
154. *Id.* at 520.
155. *Id.* at 522.
156. *See* United States v. Cadena, 585 F.2d 1252, 1261 (5th Cir. 1978), *overruled on other grounds*, United States v. Williams, 617 F.2d 1063, 1078 n.18 (5th Cir. 1980) (en banc); United States v. May May, 470 F. Supp. 384, 398-99 (S.D. Tex. 1979).
157. Article 22(3) states: "If the suspicions prove to be unfounded, and provided that the ship boarded has not committed an act justifying them, it shall be compensated for any loss or damage that may have been sustained." Convention on the High Seas, *supra* note 39, at 22(3). *See generally supra* text accompanying note 117.

lations should not clothe the defendant with immunity from criminal prosecution.[158]

Courts have also held, however, that there is an exception to the Ker-Frisbie Doctrine when a self-executing treaty, requiring no implementing legislation to take effect,[159] is involved.[160] Thus, if the boarding is made in clear violation of a self-executing treaty limiting the right of the United States to board the vessel of the sovereign nation with whom the treaty is made, domestic courts will give effect to the treaty and refrain from applying the Ker-Frisbie Doctrine.[161] The underlying principle is that in making the agreement with a foreign nation, the United States imposes a territorial limitation on itself and agrees to board the foreign vessels only in compliance with certain conditions.[162]

Since *Cook v. United States*[163] is the leading case advocating this exception, this is often called the Cook Exception.[164] In *Cook* the United States made an agreement with England concerning the seizure of British vessels suspected of smuggling intoxicating liquor into the United States during Prohibition.[165] The treaty provided that the British vessels might be seized off the coast anywhere within a distance that could be traversed within one hour.[166] When a vessel was seized in the United States customs waters but beyond the one hour's sailing distance, the defendants argued that the United States violated the treaty.[167] The court chose not to apply the Ker-Frisbie Doctrine because it considered the treaty to be self-executing.[168] The court chose to permit these treaty violations to be argued because the British position in making the treaty was that Britain would not tolerate interference with British vessels beyond that authorized by the treaty.[169] Thus treaty violations could be raised by the defendant.[170]

158. *May May*, 470 F.Supp. at 398-99; *Cadena*, 585 F.2d at 1261

159. Cook v. United States, 288 U.S. 102, 119 (1933).

160. *Cook*, 288 U.S. at 119; United States v. Postal, 589 F.2d 862, 873-75 (5th Cir. 1979), *cert. denied*, 444 U.S. 832 (1979).

161. *Cook*, 288 U.S. at 121-22; *Postal*, 585 F.2d at 875-76.

162. *Cook*, 228 U.S. at 121-22; *Postal*, 585 F.2d at 874-75.

163. 288 U.S. 102.

164. *See Postal*, 589 F.2d at 875.

165. *Id.* at 874 n.18 and 882 n.33 (citing the Convention for the Prevention of Smuggling of Intoxicating Liquors, Jan. 23, 1924, United States-Great Britain, 43 Stat. 1761-63, T.S. 685).

166. *Postal*, 589 F.2d at 874 n.18

167. *Cook*, 288 U.S. at 109-10.

168. *Id.* at 118-19, 121; *Postal*, 589 F.2d at 874-75.

169. *Cook*, 288 U.S. at115-18; *Postal*, 589 F.2d at 883.

170. *Postal*, 589 F.2d at 873-75. In *Postal* the self-executing nature of Article 6 of the Convention on the High Seas was in controversy. *Id.* at 876. Article 6 was held by the *Postal* court to be non-self-executing. *Id.* at 884. However, this conclusion is doubtful. *See e.g.*,

VI. INTERPRETATION OF SECTION 1903

To be enforceable, the Maritime Drug Law Enforcement Act should be properly interpreted to meet the guidelines and principles set down by both domestic and international law. International law is important because, as the *Restatement (Second) Foreign Relations Law of the United States* states: "If a domestic law of the United States may be interpreted either in a manner consistent with international law or in a manner that is in conflict with international law, a court in the United States will interpret it in a manner that is consistent with international law."[171]

As discussed above, the extension of jurisdiction in section 1903(c)(1)(C) is proper under both American and international law and should be upheld by the court. The denial in section 1903(d) of the right of nations to raise violations of international law, however, should not be upheld. Rather, *Cook* should be followed. In upholding the extension of jurisdiction the courts, to remain consistent with both United States and international law, must also observe the limitations that international law traditionally places on nations applying their own laws extraterritorially.[172] Essentially, to justify boarding foreign flagged vessels under the Act, there must be suspicious circumstances which warrant the boarding for a specific, authorized purpose, namely to enforce the laws of the United States prohibiting drug trafficking on the high seas. In accordance with the fourth amendment of the United States Constitution, there must be a reasonable and articulable basis for suspecting that the importation is directed towards the United States.[173] Alternatively, the importation must pose a real threat to American security[174] and interfere with the carrying out of United States customs laws concerning drug trafficking.[175] The following examples provide a sense of the proper grounds warranting searches and inspections by the Coast Guard aboard foreign flagged vessels on the high seas.

In *United States v. Green,*[176] the sloop suspected of carrying narcotics was only fifty-five miles off the coast, was moving slowly, and appeared lower in the bow than normal. The sloop did not answer the

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Riesenfeld, *The Doctrine of Self-Executing Treaties and U.S. v. Postal: Win At Any Price?*, 74 AM. J. INT'L L. 892 (1980); Connolly, "Smoke on the Water": Coast Guard Authority to Seize Foreign Vessels Beyond the Contiguous Zone, 13 N.Y.U. J. INT'L L. & POL. 249 (1980).

171. RESTATEMENT, *supra* note 59, at § 3(3).

172. United States v. Newball, 524 F.Supp. 715, 720 (E.D.N.Y. 1981).

173. *See* United States. v. May May, 470 F. Supp. 384, 395 (S.D. Tex. 1979).

174. United States v. James-Robinson, 515 F. Supp. 1340, 1345 (S.D. Fla. 1981).

175. *Id.* at 1345.

176. 671 F.2d 46 (1st Cir. 1982), *cert. denied*, 457 U.S. 1135 (1982). *See supra* notes 126-133 and accompanying text.

Coast Guard's attempts to contact it by radio until approximately two hours had elapsed. In addition, the sloop was also on the Drug Enforcement Agency's list of vessels suspected of illegal activities.[177]

In *United States v. Cortes*[178] the vessel had no permanently affixed name, flew no flag, and those aboard the vessel claimed that the commander had gone ashore because of engine trouble. The nearest land, however, was twenty-six miles away. Furthermore, when the Coast Guard did go on board they noticed that there was no main beam number identifying the vessel and that the ship smelled of marijuana.[179] Under such conditions, the Coast Guard's behavior in searching the vessel further was fully justified.

In *United States v. Cadena*[180] the vessel was two hundred miles off the Florida coast. When the Coast Guard hailed the vessel, the vessel's only English speaking man aboard, the captain, shouted a pre-arranged signal indicating the presence of law enforcement officers in the vicinity. The vessel ignored the Coast Guard's signals and continued to sail away. Furthermore, the freighter sailed without lights or a flag, and during the chase its crew members threw packages overboard.[181]

United States v. Newball[182] stands as a final example of a warranted Coast Guard boarding. In that case the Coast Guard trailed a fishing vessel for a day and observed members of the crew spread liquid about the vessel, board a small launch, and set the vessel on fire. The Coast Guard then properly boarded the vessel, put out the fire, seized the cargo, and arrested the crew.[183]

In contrast, *United States v. James-Robinson*[184] stands as an example of an improper boarding by the Coast Guard. There the boarding was improper because the vessel was four hundred miles off the coast of the United States. The Court held that there was no indirect evidence—such as location and direction in which the ship was sailing, size of the shipment, documents or inscriptions found on the vessel, or other relevant evidence—to suggest that it was sailing for the United States.[185] In *United States v. Angola*, the court also dictated caution in boarding vessels too far off the coast, citing as an illustration a vessel "half way

177. *Green*, 671 F.2d at 48.
178. 588 F.2d 106, 106 (5th Cir. 1979).
179. *Id.* at 108.
180. 585 F.2d 1252, 1256 (5th Cir. 1978).
181. *Id.* at 1256.
182. 524 F. Supp. 715 (E.D.N.Y. 1981).
183. *Id.* at 718.
184. 515 F. Supp. 1340 (S.D. Fla. 1981).
185. *Id.* at 1347.

around the world in the Gulf of Siam."[186]

Hence, courts should consider practical matters surrounding the boarding of the vessel in applying the statute and determining whether or not a boarding is justified. When the Coast Guard boards foreign flagged vessels on the high seas pursuant to the Maritime Drug Law Enforcement Act, it should comply with the past practices illustrated in the above cases. Domestic courts should attempt to ensure that the boardings do not become random and arbitrary, disturbing the orderly passage of vessels on the high seas.

VII. PROPOSED CHANGES IN THE MARITIME DRUG LAW ENFORCEMENT ACT

Proceedings under the Maritime Drug Law Enforcement Act should be similar to those in *Cook*. The agreements under the Act are between two nations and are self-executing, since it is neither necessary nor intended that the United States pass legislation giving American law enforcement personnel permission to board foreign vessels. In addition, foreign states do not intend to make an unlimited waiver of objection to United States enforcement on the high seas of United States drug trafficking laws. Rather, they intend to make only a limited waiver of their exclusive sovereignty over their own vessels. Their understanding of that agreement should be honored, just as it was in *Cook*.

For the above reasons, the section 1903(d) provision prohibiting a defendant from raising international law violations under treaties or less formal international agreements cannot be supported by recognized principles governing the raising of such violations in domestic courts. Section 1903(d) conflicts with the *Cook* Exception that takes into account the importance of giving treaties force even when it means dismissing a suit over which the court would ordinarily have jurisdiction. In the interests of adherence to the principle *nulla poena sine lege* (no punishment without law), a defendant should be allowed to argue violations of treaties. It is the treaty itself that defines whether the vessel is "within the jurisdiction of the United States." If a vessel does not fall within the jurisdiction of the United States because the conditions of the applicable treaty are not met, it is only just that this essential fact may be argued and that the party aboard the foreign vessel be allowed to raise it.

186. 514 F. Supp. 933, 936 (S.D. Fla. 1981).

VIII. CONCLUSION

In the *Lotus* case the Court held: "Vessels on the high seas are subject to no authority except that of the State whose flag they fly. In virtue of the principle of the freedom of the seas, that is to say, the absence of any territorial sovereignty upon the high seas, no State may exercise any kind of jurisdiction over vessels upon them."[187] The Maritime Drug Law Enforcement Act stands in contrast to the notion embodied in the *Lotus* Court's statement because it extends the jurisdiction of the United States to certain foreign flagged vessels on the high seas. The extension of jurisdiction under the terms of the Maritime Drug Law Enforcement Act, nevertheless, stands up to the tests of constitutionality and to the standards established by international law. Consequently, the extension in the statute is valid. The provision of the statute governing the raising of international law violations, however, does not meet the established standards of international law set down in this area and recognized by American courts. The courts should invalidate this provision since it could lead to injustices in its application by preventing the raising of legitimate defenses. Upholding the extension of jurisdiction but striking down the provision violating the Cook Exception will pave the way to enhanced but proper and orderly maritime law enforcement by the United States Coast Guard.

187. *Lotus*, 1927 P.C.I.J. (ser. A) No.10, at 25.